IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1381

EGAN OLDENDORF,

Petitioner,

vs.

BENITO LOPEZ, INTERNATIONAL TERMINAL OPERATING CO., INC., AND HOFFMAN RIGGING AND CRANE SERVICE, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EGAN OLDENDORF,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Egon Oldendorf, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above entitled case on the 9th day of December, 1976, and the order of said Court denying rehearing entered on the 10th day of January, 1977.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra* A1-A7, is not as yet officially reported. The District Court rendered no written opinion or decision. Its decision and findings are contained in the portions of the record which are printed in the Appendix hereto, *infra* A12-A20.

Jurisdiction

The judgment of the Court of Appeals was entered on the 9th day of December, 1976. Rehearing was denied on the 10th day of January, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Where a judgment is entered in a District Court in accordance with the clear and explicit findings of the trial judge and after a hearing at which all parties were invited to assist the Court in formulating the judgment and were afforded an opportunity to interpose their objections, may a Court of Appeals, under the guise of the power to raise and decide issues *sua sponte,* disregard the record and the law on which the Court and parties relied, make its own findings and reverse the judgment on issues which were not raised, briefed or argued in the Court of Appeals or in the trial court?

2. Whether the right to claim error on appeal is waived when a party does not except to a jury instruction on a theory of liability, after said party has made its position known to the Court by moving to dismiss the cause of action under that theory in accordance with Rule 50, F.R.C.P., 28 U.S.C.A., *infra* A21, and the Court has denied said motion?

Statement

This case arises out of an accident which was sustained by a longshoreman on board petitioner's vessel at the commencement of the discharge of a cargo of steel I beams from the #1 hatch of said vessel. No ship's personnel or equipment was in any way involved in the discharging operation. It was conducted by and under the direct supervision of longshoremen in the employ of International

Terminal Operating Co., Inc., (ITO), with the assistance of a shoreside mobile crane which ITO had hired together with an operator from Hoffman Rigging & Crane Service, Inc. (Hoffman).

The accident occurred shortly after the longshoremen had made up and hooked a draft of steel I beams to the cargo hook of the crane. A signalman, employed by ITO whose function was to act as the "eyes and ears" of the crane operator, then instructed the crane operator to raise the draft of I beams. Instead of raising the draft, the crane operator dragged the draft from one side of the hatch to the other over and across the cargo of steel I beams which were stowed in the hatch. As a result, one of the I beams which was stowed in the hatch became dislodged and fell over on the injured longshoreman's leg. While the draft was being dragged across the cargo in the hatch, the signalman stood by and did nothing. After the accident occurred, the signalman instructed the crane operator to stop and the crane operator stopped the operation.

The only issues on which the case was tried against petitioner was whether the lashings and chocks by means of which the cargo of steel I beams had been secured from shifting during the ocean voyage had been removed by ship's personnel prior to the commencement of the discharging operation, and if so, whether this rendered the vessel unseaworthy and the shipowner negligent. These issues were tried to a jury with counsel for all parties participating.

Petitioner's third party actions for indemnity against ITO and Hoffman, as well as ITO's and Hoffman's cross-claims for indemnity or contribution against each other were tried to the court.

The jury, on a special verdict, found that the removal of the lashings and chocks by means of which the cargo of steel beams was secured for the ocean voyage did not

render the vessel unseaworthy, but that shipowner, nevertheless, was negligent. It assessed damages at $365,000.00 and found that the injured longshoreman was contributorily negligent to the extent of 15%. Because of this, the recovery was reduced to $310,250.00.

Following the return of the jury verdict, the court granted the injured longshoreman's motion to amend his complaint and assert a direct negligence action against Hoffman. This action, together with the shipowner's actions for indemnity and the cross-claims of ITO and Hoffman, was then set for further trial.

After petitioner rested on the third party claims, the trial court granted recovery to petitioner against ITO "for the amount of the judgment against you plus counsel fees", *infra* A12.

On the completion of the testimony in the injured longshoreman's direct action against Hoffman, the trial court found the crane operator was negligent and that Hoffman was liable to plaintiff and awarded recovery against Hoffman for the damages as assessed by the jury, *infra* A13-A14.

In the course of extensive colloquy between court and counsel, the court emphasized that ITO's liability by way of indemnity was for the full amount of the damages which had been assessed against petitioner, *infra* A12, A16. It stated, however, that in "fairness and equity and justice, • • • half of the damages ought to be borne by the stevedore and half of the damages ought to be borne by Hoffman, the crane operator", but indicated uncertainty as to how to formulate a judgment to accomplish this result, *infra* A14. All counsel were in complete agreement that the indemnity awarded petitioner could be apportioned between ITO and Hoffman, *infra* A14-A18. The only dilemma which arose was in the context of apportioning the damages between ITO and Hoffman in the injured longshoreman's direct action against Hoffman, *infra* A18. Counsel for ITO suggested that since the court, as an admiralty court had equity powers, it might dispense equity so that Hoffman would not be obligated for the judgment in full *infra* A17. After reading the decision in *Hartnett* v. *Reiss S.S. Co.*, 421 F.2d 1011 (2 Cir. 1970), cert. den. 400 U.S. 852 (1970), the trial court indicated satisfaction that the indemnity award to petitioner could be apportioned between ITO and Hoffman by stating:

> "In a situation very similar to our own, the Court of Appeals approved an equal decision of liability as *between parties who correspond to ITO and Hoffman here.*" *Infra* A18.

Final judgment was then entered against petitioner which provided, that if petitioner paid the judgment, it was to recover 50% each from both ITO and Hoffman. If Hoffman paid the judgment, it was awarded 50% contribution from ITO. The provision awarding counsel fees was stricken from the judgment and all other cross-claims were dismissed.

All parties filed notices of appeal from the judgment. The injured longshoreman's appeal was subsequently withdrawn.

ITO appealed from the indemnity award to petitioner solely on the basis of the long rejected tort concept that a negligent shipowner is not entitled to an implied warranty of workmanlike service. It appealed from the award granting 50% of the damages which the judgment assessed against Hoffman on the grounds that this apportionment constituted contribution as between ITO and Hoffman. ITO further urged that it should be awarded full indemnity against Hoffman or, in the alternative, that its damages be in proportion to its fault, i.e., 15% of the total award.

Petitioner appealed from the judgment on the ground that as a matter of law, it was error to submit the case to the jury because neither under the warranty of seaworthiness nor the theory of negligence, was a shipowner obligated to furnish an accident free ship, and because under

this court's decision in *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971), a shipowner is not lable for a wholly unforeseeable single act of negligence of a third party. It also urged that the jury's findings of negligence and no unseaworthiness was inconsistent because there could be no negligent breach of a duty in the absence of the very underlying condition from which that duty arose. Petitioner also appealed from the denial of defense costs, including reasonable counsel fees.

Not withstanding the fact that ITO did not raise, brief or argue either in the trial court or on appeal, that by apportioning the indemnity award equally between ITO and Hoffman, the trial court was in effect awarding contribution. The Court of Appeals *sua sponte* construed the apportionment as in the nature of contribution and held that the apportionment constituted a constructive denial of indemnity. Not content to rest its reversal on that ground, the court went further and stated, "We agree that OLDENDORFF is precluded from obtaining indemnity from ITO * * * since between them OLDENDORFF was the party best situated to adopt preventative measures and thereby to reduce the likelihood of injury." It is not clear with whom the court was agreeing as that issue was not pleaded or raised in the court below and had not been raised, briefed or argued in the Court of Appeals.

Petitioner filed a petition for rehearing on December 23, 1976. In said petition, petitioner directed the court's attention to the portion of the record in which the trial court held specifically that it was *awarding petitioner full indemnity against ITO and reiterated that the award against ITO was by way of indemnity and not contribution.* Petitioner also directed the court's attention to the fact that conduct precluding indemnity was never raised in the court below or in the appeal.

The Court of Appeals denied the petition for a rehearing on January 10, 1977 without comment.

Reasons for Granting the Writ

1. The action of the Court of Appeals in this case undermines the fairness and integrity which our judicial proceedings are designed to assure and preserve. If a Court of Appeals, under the guise of judicial discretion, is permitted to arrive at a bizarre result by distorting the clearly expressed resolution of a litigated controversy by misinterpreting the law and disregarding the record then the very foundation of our system of administering justice would be eroded and the safeguards which were designed to promote the ends of justice would be rendered meaningless.

The reversal by the Court of Appeals of the portion of the judgment awarding indemnity to petitioner against ITO on the basis of a *sua sponte* determination of issues not presented to the District Court and not raised on the appeal was clearly in violation of the basic principles on which the proper and orderly administration of justice is predicated and constituted an unwarranted and unauthorized exercise of judicial power.

The generally accepted rule in all jurisdictions is that questions, except when they involve jurisdiction, which have not been passed on in the trial Court and not raised, briefed or argued on appeal, will not ordinarily be given consideration by an Appellate Court. *United States* v. *Tyrrell*, 329 F.2d 341, 345 (7 Cir. 1964); *Smith* v. *American Guild of Variety Artists*, 368 F.2d 511, 514 (8 Cir. 1966). As this Court said in *Atkinson* v. *United States*, 297 U.S. 157, 159 (1936):

> "This practice is founded upon considerations of fairness to the Court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact."

In this case, even though the record clearly showed that the trial Court awarded petitioner full recovery against ITO and was explicit that it was by way of indemnity and not contribution, *infra* A12, A16, A19, the Court of Appeals disagreed with the trial Court and *sua sponte* concluded that, even though the trial Court had styled it as indemnity, it was more in the nature of contribution, *infra* A6.

Furthermore, even though the trial Court was clear and explicit that it was limiting ITO's liability for indemnity in the judgment to 50% because "fairness and equity and justice" would be served if half of the damages were borne by ITO and half by Hoffman and such an equal decision of liability as between parties who correspond to ITO and Hoffman had been approved in *Hartnett* v. *Reiss Steamship Company*, 421 F.2d 1011, 1019 (2 Cir. 1970) cert. den. 400 U.S. 852 (1970), *infra* A14, A18 the Court of Appeals construed apportionment as a constructive denial of indemnity pursuant to *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), *infra* A6.

Although the issue of conduct precluding indemnity had not been pleaded as a defense and had not been raised either in the trial Court or on appeal, the Court of Appeals nonetheless again *sua sponte* found as a fact that petitioner "was the party best situated to adopt preventive measures and thereby reduce the likelihood of injury". It then concluded "We agree that Oldendorf is precluded from obtaining indemnity from ITO." even though no one had neither raised such an issue, nor even intimated that there was any such issue in this case, *infra* A6.

While Federal Appellate Courts have power to raise and decide issues *sua sponte*, they have no original jurisdiction and lack power to make findings of fact. *Randall Foundation* v. *Riddell*, 244 F.2d 803, 805 (9 Cir. 1957); *Hill York Corp.* v. *American Franchises Inc.*, 448 F.2d 680, 691 (5 Cir. 1971). Since the issue of conduct precluding indemnity is a question of fact and not of law, *International*

Terminal v. *Nederl*, 393 U.S. 74 (1968), the Court of Appeals clearly exceeded its jurisdiction in finding that petitioner was the party best situated to adopt preventive measures and thereby reduce the likelihood of injury. In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) on which the Court of Appeals purportedly relied, this Court reiterated that shipowner negligence was not fatal to recovery against a stevedore, (376 U.S. at page 320), and held that as between the shipowner and the stevedore who has supervision and control over the injury producing and defective equipment, is in a far better position than the shipowner to minimize the risk and avoid the accident, (376 U.S. at pages 323 and 324). At least a trier of the fact could so find.

Nor does the power to raise and decide issues *sua sponte* authorize an Appellate Court to distort the result reached in a litigated controversy, where considerations underlying the issues were exposed and distilled by the trial Court, and substitute its own resolution in disregard of the record and the decisional law. As this Court held in *Hormel* v. *Helvering*, 312 U.S. 552, 558 (1941) this power may be exercised only in exceptional cases when it is obvious from the record that to do otherwise would result in a plain miscarriage of justice. It is obvious from the record in this case that the result of the apportionment of the ultimate liability by way of indemnity between ITO and Hoffman was not a plain miscarriage of justice. Not only did *Hartnett* v. *Reiss Steamship Company*, 421 F.2d 1011, 1019 hold that apportionment was proper between parties who corresponded to ITO and Hoffman in this case, but such an apportionment was also allowed in *De Gioia* v. *United States Lines Company*, 304 F.2d 421 (2 Cir. 1962) *and D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 351-352 (5 Cir. 1966). *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) which the Court of Appeals cited in support of its finding that apportionment of the indemnity awarded petitioner between ITO and Hoffman constituted a constructive denial of indemnity to petitioner

supports no such proposition. It held instead, that the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 905, did not shield the stevedore employer from liability for indemnity to a shipowner. *Cooper Stevedoring Co., Inc.* v. *Kopke,* 417 U.S. 106 (1974) held that contribution between mutual wrongdoers was not prohibited when it involved a liability which was not shielded by statute. The Court of Appeals obviously confused the independent contractual obligation which ITO owed the shipowner and the obligation ITO owed its employees.

In any event, the trial Court had apportioned the ultimate liability between ITO and Hoffman and not between ITO and petitioner. If the apportionment was invalid, it was invalid only as between ITO and Hoffman and the Court of Appeals should have awarded petitioner full indemnity against ITO in accordance with the findings and conclusions of the trial Court as judgments are required to be interpreted in the light of the trial Court's findings and conclusions, *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 294, 295 (1943).

The decision of the Court of Appeals has resulted not only in a gross miscarriage of justice, but represents a clear abuse of the powers of Appellate Review and a total disregard of the basic principles of due process.

2. Clearly the questions are of importance and merit the exercise of this Court's supervisory powers to prevent the further erosion of the rules and legal principles which have been promulgated and defined in order to preserve the fairness, integrity and public reputation of judicial proceedings. When this Court on December 4, 1967 adopted the Federal Rules of Appellate Procedure its order of adoption provided that these rules are to govern the practice in appeals to the United States Courts of Appeals from the United States District Court. These rules are clear and obviously were intended to serve as guidelines so that the litigants would have a fair oppor-

tunity to be heard and the Courts would not be charged with errors which they did not commit or with failure to adjudicate an issue which they were not required to determine.

These rules recognized that as much as uniformity of practice and procedure was desired, the inflexible application of the rules would lead to injustice or conflict with the power given under Section 2106 of 28 U.S.C.A. which allows Federal Appellate Courts to modify, reverse or remand decisions "as may be just under the circumstances". (*Hormel* v. *Helvering,* 312 U.S. 552, 557 (1941). This appears to have been the intent of F.R.A.P. Rule 1(b), 28 U.S.C.A., which states:

> "These rules shall not be construed to extend or limit the jurisdiction of the Courts of Appeals as established by law."

It is well established law that Federal Appellate Courts do not have the power to decide factual issues *de novo, Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969) nor to reverse judgments and substitute their own judgment unless it is clear from the entire record that the judgment is, in fact, clearly erroneous and that an injustice has been done. *United States* v. *United States Gypsum Co.,* 33 U.S. 364 (1948) rehearing denied 33 U.S. 869 (1948). Nor, as the Court said in *Frieze* v. *West American Ins. Co.,* 190 F.2d 381, 382 (8 Cir. 1951) was it intended that under the rules new issues could be considered on appeal "if the purpose and result would be reversal of the case unless public policy or the plain miscarriage of justice requires."

Needless to say, Rule 40 of the Federal Rules of Appellate Procedure, 28 U.S.C.A., is not without purpose. It authorizes a petition for rehearing to bring to the attention of the reviewing Court points of law or fact which the Court may have overlooked. It would seem that a more meaningful

compliance with this rule would not leave the writ of certiorari as the last resort.

3. The decision below appears to be in conflict with applicable decisions of this Court. In *Cooper Stevedoring Co.* v. *Kopke,* 417 U.S. 106, 109 [2]4 (1974), this Court refused to consider an issue on the grounds of lack of jurisdiction because it had not been raised in the petition for a writ of certiorari. In *Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976), this Court reversed because, although the Court of Appeals had jurisdiction to proceed on the merits, injustice was more likely to be caused than avoided by deciding the issue without affording petitioner an opportunity to be heard, even if petitioner had no evidence but only legal arguments to offer. In *Turner* v. *City of Memphis,* 369 U.S. 350, 352 (1962), this Court vacated an order and directed entry of a decree granting relief only after assuring itself that, on the record, no issue remained because the facts were not in dispute.

This Court's Rule 23(1)(c) is similar in scope and purpose, to Rule 28(a)(2) of the Federal Rules of Appellate Procedure. It does seem that public interest, if not consistency, requires that the Federal Appellate Court exercise at least the same scrupulous concern which this does so that litigation may be brought to an end after fair opportunity has been afforded to present all issues of law and fact and a controversy is resolved on the record and in accordance with the law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 162, 163, 164—September Term, 1976.

(Argued November 19, 1976 Decided December 9, 1976.)

Docket Nos. 76-7208, 76-7211, 76-7212

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF,

Defendant and Third Party Plaintiff-Appellant and Appellee,

INTERNATIONAL TERMINAL OPERATING CO., INC., and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

Defendants-Appellants and Appellees.

Opinion of Court of Appeals.

Before:

WATERMAN and MULLIGAN, *Circuit Judges,*
and POLLACK*, *District Judge.*

Appeals from a judgment of the United States District Court for the Southern District of New York, Hon. Inzer B. Wyatt, *Judge,* awarding damages to plaintiff longshoreman, and awarding indemnity and contribution among the defendant and third-party defendants.

Affirmed in part; reversed in part.

ROBERT KLONSKY, Brooklyn, New York (DiCostanzo, Klonsky & Cutrona, Brooklyn, New York), *for Plaintiff-Appellee.*

VICTOR S. CICHANOWICZ, New York, New York (Cichanowicz & Callan, New York, New York), *for Defendant and Third Party Plaintiff-Appellant and Appelle.*

JOSEPH A. COHEN, New York, New York (Alexander, Ash, Schwartz & Cohen, New York, New York, Sidney A. Schwartz, of Counsel), *for Third Party Defendant-Appellant and Appellee.*

ROBERT S. BLANC, New York, New York (Hill, Betts & Nash, New York, New York), *for Third Party Defendant-Appellant and Appellee.*

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* Hon. Milton Pollack, United States District Court for the Southern District of New York, sitting by designation.

Opinion of Court of Appeals.

MULLIGAN, *Circuit Judge:*

On October 21, 1968, International Terminal Operating Co., Inc. (ITO), a stevedoring company, and Hoffman Rigging & Crane Service, Inc. (Hoffman), the owner and operator of a shoreside crane hired by ITO, were engaged in unloading a cargo of steel beams from the M/V Jobst Oldendorf, a vessel owned by Egan Oldendorf. The vessel was tied up with her portside inshore and her starboard side offshore. Prior to the arrival of the longshoremen, the ship's personnel removed the lashings and chocks which had secured the stow. The Hoffman crane, operated by Leo Hogan, was driven onto the pier alongside the hatch of the vessel and received instructions from an ITO signalman.

The accident which occasioned this litigation occurred with the removal of the first draft. The plaintiff Benito Lopez and three other longshoremen secured the first draft with chains and attached them to the cargo hook of the crane. The ITO signalman then instructed Hogan merely to hoist the hook with the cargo attached. Instead, Hogan raised the boom of the crane, causing the draft to drag from the offshore side over to the inshore side. The draft struck and dislodged a beam which fell over and onto Lopez's leg.

Lopez brought suit in the United States District Court for the Southern District of New York, Hon. Inzer B. Wyatt, District Judge, against Oldendorf, alleging both unseaworthiness of the vessel as well as negligence. Oldendorf impleaded ITO, Lopez's employer, and Hoffman, seeking indemnity from both. Hoffman and ITO cross-claimed against each other, seeking both indemnity and contribution. During the trial, Lopez was permitted to amend his complaint to sue Hoffman directly for negligence. The action by Lopez against Oldendorf was tried to a jury. All claims among Oldendorf, ITO and Hoffman, as well as

Lopez's action against Hoffman, were tried to the court. Counsel for all parties participated in the jury trial of the Lopez action against Oldendorf.

In the jury trial, a special verdict was returned on February 10, 1976 which provided: a) Lopez failed to establish his claim of unseaworthiness against Oldendorf, b) Lopez did establish his claim of negligence against Oldendorf, c) Lopez's total damages amounted to $365,000, and d) Lopez was 15% contributorily negligent. Because of the last finding, Lopez's recovery was reduced to $310,250. The court then undertook the resolution of the remaining issues. Because of its employee's 15% contributory negligence, ITO was held to have breached its warranty of workmanlike service and was obligated to indemnify Oldendorf. Hoffman was held liable to Lopez for the negligence of Hogan in operating the crane. The final judgment made Oldendorf and Hoffman jointly and severally liable. If Oldendorf paid the judgment, it was to recover 50% from both ITO and Hoffman. If Hoffman paid, it was awarded 50% contribution from ITO. Oldendorf was denied counsel fees, and all other cross-claims were dismissed. The various arguments raised on appeal are considered seriatim.

Oldendorf makes two arguments for reversal of the judgment against it. It first contends that there was insufficient evidence to submit the case to the jury, citing *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960) for the proposition that a ship owner is not required to provide an accident-free vessel. This is a correct statement of the law, but the court's charge to the jury included this qualification. The factual issue was whether the lashings and chocks had been removed prior to the accident, and if they were, whether this constituted unseaworthiness or negligence. The resolution of this question, upon which there was conflicting evidence, was well within the classic function of the jury.

Oldendorf also contends that the verdict was fatally inconsistent in finding that this act, although not rendering the vessel unseaworthy, was nonetheless negligent. In this circuit we have held that every effort must be made to reconcile such apparently contradictory findings, *Henry* v. *A/S Ocean*, 512 F.2d 401, 405-06 (2d Cir. 1975). Moreover, although the issue here is close, Oldendorf waived any claim of error on this ground when it failed to challenge that portion of the charge which instructed the jury that "you must consider and make a separate determination as to this second or alternative theory no matter how you decide the unseaworthiness theory."

Hoffman argues that it is not liable because its crane operator, Hogan, was the borrowed servant of ITO. However, in a comparable factual setting, the Supreme Court has held that the mere reception of signals by a winchman from a stevedore's foreman did not operate to relieve the winchman's employer of liability for the negligence of its employee. *Standard Oil Co.* v. *Anderson*, 212 U.S. 215 (1909). Hoffman also contends that the granting of plaintiff's informal motion to proceed directly against it in February 1976, without requiring compliance with Fed. R. Civ. P. 14(a), deprived it of the opportunity to demonstrate prejudice from the delay in the assertion of this claim. Aside from its failure to indicate the nature of such prejudice, Hoffman was an active participant in the case from the time of its joinder as a third party defendant in 1969. The nature of its potential liability having been clear from the beginning and developed at trial, the motion to amend the complaint cannot have come as any surprise. Cf. *Wasik* v. *Borg*, 423 F.2d 44, 46 (2d Cir. 1970). Finally, Hoffman challenges the jurisdiction of the court below to have entertained the direct action in the face of an absence of diversity of citizenship between itself and Lopez. However, ¶ 4 of the amended complaint clearly indicates that the basis

of jurisdiction is the "admiralty and maritime nature of the claim." Fed. R. Civ. P. 9(h).

ITO contends that it was error to award Oldendorf indemnity against it, and to grant Hoffman a 50% contribution from it. Although the award in favor of Oldendorf was styled an "indemnity," it was more in the nature of contribution since ITO's liability was limited to 50% of the damages rather than a full recovery over. In these circumstances, the court below constructively denied Oldendorf indemnity pursuant to *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). We agree that Oldendorf is precluded from obtaining indemnity from ITO, *Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397, 401-02 (2d Cir. 1974), since between them Oldendorf was the party "best situated to adopt preventive measures and thereby to reduce the likelihood of injury." *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964). Since we conclude that Oldendorf is precluded from obtaining indemnity, the theory upon which ITO was found liable, we reverse that portion of the judgment granting Oldendorf a 50% recovery from ITO. This disposition defeats Oldendorf's claim for attorney's fees since while they are recoverable when the ship owner is entitled to indemnity, *DeGioia* v. *United States Lines Co.*, 304 F.2d 421, 426 (2d Cir. 1962), such an award is inappropriate where, as here, indemnity is precluded.

Equally unsupportable is the 50% contribution awarded Hoffman against ITO. Inasmuch as ITO furnished its employee Lopez with the benefits required by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., it is not subject to a claim for contribution. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Hurdich* v. *Eastmount Shipping Corp., supra*, 503 F.2d at 400; *Williams* v. *Pennsylvania R.R.*, 313 F.2d 203, 210 (2d Cir. 1963).

We therefore affirm that portion of the judgment holding Oldendorf and Hoffman jointly and severally liable. In view of the findings below that both were negligent, each is to bear ultimate responsibility for one-half of the plaintiff's damages. We reverse the award of indemnity to Oldendorf against ITO, as well as the contribution granted Hoffman from ITO. In view of the eight-year period which has elapsed since the accident occurred, the mandate shall issue forthwith.

Amended Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of December one thousand nine hundred and seventy-six.

Present: HON. STERRY R. WATERMAN,
HON. WILLIAM H. MULLIGAN, C.JJ.,
HON. MILTON POLLACK, D.J.
Circuit Judges.

76-7208
76-7211
76-7212

Benito Lopez,
Plaintiff-Appellee,

v.

Egan Oldendorf,
Defendant & Third Party Plaintiff,

v.

International Terminal Operating Co., Inc., Hoffman Rigging and Crane Service, Inc., and Paul Wilson & Co., A.S.,
Third Party Defendants,

Hoffman Rigging and Crane Service, Inc. International Terminal Operating Co., Inc.,
Third Party Defendants-Appellants.

Amended Judgment of Court of Appeals.

Benito Lopez,
Plaintiff,

v.

Egan Oldendorf and Hoffman Rigging & Crane Service, Inc.,
Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed in part and reversed in part in accordance with the opinion of this court, with costs to be taxed against defendants-appellants-appellees, Egan Oldendorf and Hoffman Rigging and Crane Service.

A. DANIEL FUSARO, Clerk

by: VINCENT A. CARLIN
Chief Deputy Clerk

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of January, one thousand nine hundred and seventy-seven.

Present:

HON. STERRY R. WATERMAN
HON. WILLIAM H. MULLIGAN
Circuit Judges
HON. MILTON POLLACK
District Judge

76-7208

Benito Lopez,
Plaintiff-Appellee,

v.

Egan Oldendorf,
Defendant and Third-Party
Plaintiff-Appellant-Appellee,

v.

International Terminal Operating Co., Inc., et al.,
Third-Party Defendants,

Hoffman Rigging and Crane Service, Inc., International Terminal Operating Co. Inc.,
Third-Party Defendants-Appellants.

Order Denying Petition for Rehearing.

Benito Lopez,
Plaintiff-Appellee,

v.

Egan Oldendorf and Hoffman Rigging & Crane Service, Inc.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant-appellee Egan Oldendorf,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

Excerpts From Transcript of Trial
(Findings of Wyatt, U.S.D.J.).

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(13) Mr. Cichanowicz: As far as the shipowner is concerned now on the third party claims, I rest.

The Court: All right. You are entitled to a judgment for the amount of the judgment against you plus counsel fees, and we won't enter the judgment offer until Mr. Cohen or Mr. Schwartz have had a chance to review the matter and discuss it.

It would be better if you could agree on the matter of counsel fees, but if you can't I will have to fix it.

All right.

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(111) The Court: All right. What is next?

Mr. Blanc: Hoffman rests, your Honor.

The Court: All right.

Anything else?

Mr. Schwartz: May I have a moment to see whether I have any rebuttal? I don't know about Mr. Klonsky.

Mr. Klonsky: I have no rebuttal.

The Court: All right, Mr. Schwartz.

(Pause.)

Mr. Schwartz: I don't know the sequence of things, but since I spoke last, ITO rests, your Honor.

The Court: All right.

Does anybody else want to offer anything?

Mr. Cichanowicz: No, your Honor.

Mr. Klonsky: I just would like the court to take judicial notice of the pleadings with respect to the participation of Hoffman in the trial in the main as well as in the claim offer.

The Court: Oh, yes.

Mr. Schwartz: I should have said before I rest, I think it is manifest, though, that with respect to the issue that we are trying at this time, that all of the testimony that is

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in this case thus far, (112) including that of Mr. Gomez taken on February 4, 1976, is before your Honor on the third-party complaint.

The Court: On the claim of the plaintiff against Hoffman, I am bound to find, and find, that Hoffman is liable to the plaintiff.

I am persuaded that the raising of the boom by Hoffman was negligent, and the testimony today of the Hoffman crane operator confirms that he topped the boom, that is, he brought it up higher, elevated the head of the boom, without any signal from the signalman.

He says that he gave a signal himself. He made the decision to do it and gave a signal to the signalman.

Of course, normally the signalman's back was turned to the crane operator.

He says that he stopped. What he stopped, I don't know what he refers to, whether he means he stopped tightening the fall or winding the cable, or whether he means he had started topping the boom and stopped topping it. But he says that when he stopped the crane operation, that caused the signalman to turn around and look at him, and he then gave a signal to indicate that he was going to elevate the head of the (113) boom.

I notice that in Plaintiff's Exhibit 13 and ITO Exhibit D —and ITO Exhibit D, at least, was a statement of the crane operator made on the very day of the accident—there is no mention of elevating the head of the boom in any way, shape or form, and there is no mention of any signal from the crane operator to the signalman that he was going to do so.

On the other hand, the testimony of Gomez, the signalman, is quite explicit. For some reason we have been furnished, or the clerk has a copy, or there is in the clerk's file, a transcript of the testimony of Gomez, and on cross examination by Mr. Cohen, at least, Gomez unequivocally

says that the tip of the boom was raised, the boom was topped without any signal from him, Gomez. That, of course, is confirmed by the Hoffman crane operator.

Of course, Gomez says nothing whatever about any signal from the crane operator that that's what he was going to do, and Gomez says nothing about anything being stopped and his turning around to look at the crane operator.

I am bound to say that elevating the tip of the boom caused the sliding motion inshore of the (114) draft which hit one of the I-beams, which in turn fell on the plaintiff and caused the accident. So I am bound to say that the plaintiff has established liability on the part of Hoffman.

As to all the other issues in the case and how we resolve this, fairness and equity and justice, it seems to me, are served if the recovery of the plaintiff or if half the damages—and if it is necessary to fix damages I am going to accept the jury's verdcit in that respect—half of the damages ought to be borne by the stevedore and half of the damages ought to be borne by Hoffman, the crane operator.

In the midst of all this welter of Second Circuit law, claims, counterclaims and cross claims and direct claims, I don't know how I can pick my was to accomplish that result, but that is what I have to figure out.

Mr. Klonsky, do you know how it can be done?

If I give you a judgment in the full amount against Hoffman and you got a judgment in the full amount against the shipowner, obviously you can't recover twice.

Mr. Klonsky: That's right.

The Court: What happens? Do you then (115) have your choice as to whether you collect everything against Hoffman?

Mr. Klonsky: I have no choice, your Honor. But I would defer to Mr. Schwartz, who has much more experience in third-party cases than I have.

I usually stop when I sue the defendant. I have no interest in going beyond ordinarily. But Mr. Schwartz has been beyond many times and I would defer to his thoughts on this subject, your Honor.

Mr. Schwartz: I refuse to be amicus to the plaintiff, your Honor.

The Court: But you ought to be amicus, Mr. Schwartz, to the court.

Mr. Schwarz: I think there is something else that you might take into consideration, your Honor.

I don't think you are making new law or it is pioneer justice; I think it is a question of equity too, as your Honor indicated.

Your Honor has indicated at the outset of today's session that we are being held—when I say "we," it is ITO—are being held liable because the negligence of our employees is imputable to us and which constitutes a breach of the warranty of workmanlike (116) services that we owe the shipowner.

The Court: That's right, under Rodriguez.

Mr. Schwartz: Your Honor cited our own Rodriguez case, which has just been decided.

The Court: That's right.

Mr. Schwartz: If that is the law, that the United States Supreme Court finally holds is the law, despite the fact that there are differences of circuit opinions on this question but nonetheless the Second Circuit holds what your Honor has held, then I think that your Honor ought to remember that the plaintiff has been held guilty of contributory negligence to the extent of 15 per cent, and obviously that is excused from his recovery against the shipowner.

The Court: Yes.

Mr. Schwartz: So therefore in the ultimate picture, because of our employees' negligence, that 15 per cent

already has been subtracted from the shipowner's liability.

On the other hand, if it hasn't been excised as your Honor views it—and you remember Judge Kaufman, when he was in the district court, had that view, that it is excused—but nonetheless, if it is not excised (117) by what the subsequent cases have treated with it, then I say that the most that we should be liable, if at all, is the 15 per cent of our employees' contributory negligence in this case, and that should be the sum total of our liability in this case, if at all.

The Court: Rodriguez gives me no choice. It says all or nothing, and it says all.

Mr. Schwartz: Rodriguez didn't have co-third-party defendants.

The Court: That is right.

Mr. Schwartz: We were the only third-party defendant.

Mr. Cichanowicz: Your Honor, I think on that point—

The Court: Mr. Schwartz, what do you suggest that I do?

What happens if I enter a judgment against Hoffman for the full amount and enter a judgment for the shipowner against Hoffman and ITO, 50 per cent against Hoffman and 50 per cent against ITO?

Now, they are judgments, but how does the plaintiff get paid?

If he levies on execution on Hoffman, as he could do, as I understand it, then the shipowner never, (118) never gets any recovery or never pays anything. Therefore, the shipowner has no claim-over and Hoffman ends up standing 100 per cent of the loss, which to me seems inequitable and it is not what I want to bring about.

Mr. Schwartz: I think your Honor has put his finger on a thorny problem that concerns all of us and I don't know that I have the answer to it.

I do appreciate fully that an entry of a judgment against Hoffman, which your Honor has indicated the plaintiff is entitled to, exposes Hoffman to having to satisfy that judgment wholly to the plaintiff.

The Court: That's right.

Mr. Schwartz: In which event the shipowner has come away clean with respect to any payment it has to make, with the exception of counsel fees, which is a question for your Honor's determination yet.

The Court: Yes. And I have—

Mr. Schwartz: But the shipowner comes out whole.

What Hoffman's rights are with respect to ITO, if your Honor were to find 50-50 liability to the shipowner, what Hoffman's rights are where they pay the judgment to the plaintiff because they are a (119) direct defendant to the plaintiff, I don't know the answer to that. And yet the plaintiff has made out his case against Hoffman as your Honor has held.

The Court: Yes, that's right.

Mr. Schwartz: By the same token, we are in an admiralty court, we are applying maritime law, despite the fact there was diversity of citizenship which gave the plaintiff the right to have his issues determined by a jury, and yet I assume that admiralty, being an equity court, might dispense equity so that result does not obtain. But I don't know the answer to your Honor's question.

The Court: I suppose that one thing I could do—whether the Court of Appeals would approve of it is another matter—I would enter a judgment, vacate the present judgment against the shipowner, enter a judgment against the shipowner for 50 per cent of the total amount, enter a judgment against Hoffman for 50 per cent, hoping that the plaintiff can recover from both, and enter a judgment for the shipowner for 50 per cent—for all of the judg-

ment against ITO and 50 per cent of the counsel fees against ITO and 50 per cent against Hoffman. That would wind up with the result that I want to accomplish.

(120) Mr. Klonsky: Maybe they can stipulate to that result and let the Court of Appeals find out whether that should stand on liability only.

The Court: I think that's what I will do, whether it is stipulated to or not.

Mr. Cichanowicz: Your Honor, there is a case in the Second Circuit, Hartnett against Reis, in which the shipowner was held liable and then he was allowed 50 per cent recovery against two co-stevedores. That way, apparently, would be no problem.

The finding against Hoffman may create a problem.

Mr. Klonsky: The trouble is, your Honor, that they cannot be treated as joint tort-feasors, the stevedore and Hoffman, because the stevedore could not be sued directly by the plaintiff inasmuch as he is the employer, and an employer is not a joint tort-feasor. That is the major problem as I see it to give any clear resolution of this.

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(125) Afternoon Session

(2:30 p.m.)

The Court: I have read the Hartnett case, I guess, which is the grain case from Buffalo. I have read the opinion of the Court of Appeals.

In a situation very similar to our own, the Court of Appeals approved an equal division of liability as between parties who correspond to ITO and Hoffman here.

It is a 1970 case and the records are presumably in a warehouse so that I have no idea what the judgment looked like.

At any rate, it seems clear that the judgment which has already been entered against the shipowner, Oldendorff, for $310,250 should stand.

If Oldendorff does not pay that judgment, then of course Oldendorff has no indemnity as against the other parties, nor will Oldendorff receive its counsel fees unless its pays the judgment.

But if the shipowner pays the judgment, then the shipowner may recover 50 per cent against ITO plus 50 per cent of counsel fees, and may recover 50 per cent against Hoffman plus 50 per cent of counsel fees.

(126) There may be judgment for $310,250 against Hoffman. If Hoffman pays the judgment, Hoffman is entitled to recover 50 per cent ITO and an appropriate judgment may reflect that.

All other claims and cross claims or any claims, cross claims, counterclaims inconsistent with this are dismissed.

The parties may either agree on the form of judgment or judgments or they may submit them on notice.

I don't think we need to do anything else.

Mr. Schwartz: I would like to, before we conclude, your Honor, having talked to Mr. Blanc, there is something that is left open here which lends itself to some disposition by your Honor.

Mr. Blanc and I have agreed—have we not, Mr. Blanc? —that this crane and whatever came with it was ordered from Hoffman by ITO as the customer.

Mr. Blanc: Correct.

Mr. Schwartz: And with that in mind, your Honor, I respectfully, knowing that your Honor has pretty much disposed of the claims, call your Honor's attention to the fact that in our answer ITO has a cross claim against Hoffman for breach of its (127) expressed and implied warranties to us with respect to the operation of the crane that we ordered from them, and I say to your Honor most

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respectfully that having been case into liability under the Rodriguez case because of the negligence of our own employee, that in equity and in conscience and under the law we should be entitled to indemnity from Hoffman because it, by its actions, has cast us into liability for whatever we are called upon to pay in this case.

The Court: No, you are not entitled to anything.

I don't believe there was any express or implied warranties from Hoffman and you are entitled to nothing and will take nothing as against Hoffman, because I want to leave and I think my dictated result will leave 50 per cent of the liability on ITO and 50 per cent on Hoffman.

I still don't know the technical or admiralty forms of the formal judgment papers or decree.

Mr. Schwartz: At lunch, with the exception of Mr. Blanc, Mr. Klonsky, Mr. Cichanowicz and I kicked around the form of a judgment that might carry into execution your Honor's disposition, even though I respectfully disagree with my not having a right over (128) as against Hoffman.

If we can go off the record and use that blackboard for a moment, if your Honor wishes to spend the time, perhaps we can agree on a form of judgment.

The Court: All right. Certainly. I will contribute my energy and strength if it will help in any way.

(Discussion off the record.)

Mr. Cichanowicz: Your Honor, may I note an exception to the portion of your Honor's ruling in which apparently counsel fees, defendant's counsel fees, are contingent upon the defendant paying the judgment.

The Court: All right.

I think I have done as much as I can do.

All right, Mr. Clerk, we will be in recess.

Statutes Involved

TITLE 28, APPENDIX.—RULES OF CIVIL PROCEDURE

RULE 50.—MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) Motion for directed verdict; when made; effect.

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1381

EGAN OLDENDORF,

Petitioner,

versus

BENITO LOPEZ, INTERNATIONAL TERMINAL OPERATING CO., INC., and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Respondents.

BRIEF OF RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

As set forth in the as yet unreported opinion of the Court of Appeals:

> "On October 21, 1968, International Terminal Operating Co. Inc. (ITO, a stevedoring company, and Hoffman Rigging & Crane Service, Inc. (Hoffman), the owner and operator of a shoreside crane hired by ITO, were engaged in unloading a cargo of steel beams from the M/V Jobst Oldendorf, a vessel owned by Egan Oldendorf. The vessel was tied up with her port-

side inshore and her starboard side offshore. Prior to the arrival of the longshoremen, the ship's personnel removed the lashings and chocks which had secured the stow. The Hoffman crane, operated by Leo Hogan, was driven onto the pier alongside the hatch of the vessel and received instructions from an ITO signalman.

The accident which occasioned this litigation occurred with the removal of the first draft. The plaintiff Benito Lopez and three other longshoremen secured the first draft with chains and attached them to the cargo hook of the crane. The ITO signalman then instructed Hogan merely to hoist the hook with the cargo attached. Instead, Hogan raised the boom of the crane, causing the draft to drag from the offshore side over to the inshore side. The draft struck and dislodged a beam which fell over and onto Lopez's leg.

Lopez brought suit in the United States District Court for the Southern District of New York, Hon. Inzer B. Wyatt, District Judge, against Oldendorf, alleging both unseaworthiness of the vessel as well as negligence. Oldendorf impleaded ITO, Lopez's employer, and Hoffman, seeking indemnity from both. Hoffman and ITO cross-claimed against each other, seeking both indemnity and contribution. During the trial, Lopez was permitted to amend his complaint to sue Hoffman directly for negligence. The action by Lopez against Oldendorf was tried to a jury. All claims among Oldendorf, ITO and Hoffman, as well as Lopez's action against Hoffman, were tried to the Court. Counsel for all parties participated in the jury trial of the Lopez action against Oldendorf.

In the jury trial, a special verdict was returned on February 10, 1976, which provided: a) Lopez failed to establish his claim of unseaworthiness against Oldendorf, b) Lopez did establish his claim of negligence against Oldendorf, c) Lopez's total damages amounted to $365,000, and d) Lopez was 15% contributorily negligent. Because of the last finding, Lopez's recovery was reduced to $310,250."

Thereafter judgment was entered in the District Court in favor of Oldendorf against ITO in the amount of 50% if Oldendorf paid plaintiff's judgment; and in favor of Hoffman against ITO in the amount of 50% in the event Hoffman paid plaintiff's judgment. In its appeal to the Court of Appeals ITO argued, among other things, that since Oldendorf was liable for its own negligence and not for unseaworthiness it could not, under the circumstances, recover indemnity from ITO; and that under controlling law neither Oldendorf nor Hoffman could recover contribution from ITO as the District Court had permitted. The Court of Appeals held in favor of ITO on these two points and it is from that determination that Oldendorf seemingly seeks a review.

It is to be noted that the first of the questions presented in the petition for a writ is inaccurate as the legal issues on which the Court of Appeals decided the case were in fact raised, briefed and argued. The second of the questions presented in Oldendorf's petition is not only not argued or discussed anywhere in the petition, but would seem to relate solely to the recovery by Lopez against Oldendorf (as that was the only part of the case tried to a jury) and is therefore not something involving this respondent.

POINT I

The basic issue raised by the petition has been moot for the past four years and is of limited application at present to a dwindling number of old lawsuits.

Respondent submits that the basic issue here is the interplay between a shipowner's warranty of seaworthiness, the stevedore's warranty of workmanlike service set forth by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) and refined in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964), and the immunity to a claim for contribution of a stevedore employer under the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. 905 as articulated in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and recently reaffirmed in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). However, issues relating to a vessel owner's liability for seaworthiness, and its right to obtain either indemnity or contribution from a stevedore employer have all been academic since November 27, 1972, the effective date of the 1972 Amendment to the aforesaid *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. §905(b). For, as that statute indicates, as of November 27, 1972 the vessel owner no longer has a liability to a longshoreman based upon a warranty of seaworthiness, and the stevedore employer was removed of any liability whatsoever to the vessel owner, either directly or indirectly, and any agreements or warranties to the contrary were voided.

Accordingly, the tri-partite personal injury litigation involving longshoremen, shipowners, and stevedores which at one time flooded the Federal Courts has not existed since November 27, 1972. The case at bar is one of a

dwindling number of lawsuits of much older vintage. The issues thus presented by the case at bar are of extremely limited application and will in time become completely academic as the few remaining pre-Amendment cases are concluded.

In dealing with this same amendment this Court stated in Footnote 6 of its decision in *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974):

> "The intent and effect of this amendment were to overrule this Court's decisions in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See H.R. Rep. No. 92-1441, pp. 4-8 (1972); S. Rep. No. 92-1125, pp. 8-12 (1972)."

One of the consequences of such amendment was set forth as follows in *Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 527 F.2d 1282, 1287 (2 Cir. 1975):

> "Congress has responded to the need. In 1972, it substantially revised the allocation of liability for accidents of this sort. 33 U.S.C. §905(b). The new statutory scheme deals with these problems in a comprehensive way that would be impossible for a court. *Since future cases will be governed by the statute, the reexamination of the settled law of this circuit which the stevedore invites us to make would have only the most limited practical effect.*" (Italics added)

POINT II

The Court of Appeals acted in accordance with well settled principles of law.

The judgment awarding both Oldendorf and Hoffman a 50% contribution from ITO was reversed by the Court of Appeals under well-settled law prohibiting such a claim. (It should be noted parenthetically that although Hoffman has filed its own petition for a Writ of Certiorari, it does not seek review of this action by the Court of Appeals).

The keystone decision holding that there is no right of contribution from a maritime employer who has paid compensation benefits to an injured longshoreman pursuant to the Longshoremen's and Harbor Workers' Compensation Act, *supra,* is *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 72 S. Ct. 277 (1952). That principle was reaffirmed by this Court in *Pope & Talbot Inc.* v. *Hawn,* 346 U.S. 406, 74 S. Ct. 202 (1953) wherein it was held that to subject such a compensation paying employer to contribution would frustrate the purpose of the Act.

And, when the issue was last before this Court in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke, Inc.,* 417 U.S. 106, 94 S. Ct. 2174 (1974) this Court found that the factors underlying the decision in *Halcyon* still had force and vitality.

No point would be served in setting forth at length hereat all the many lower Court decisions that have adhered to these cases. However, it would certainly be strange for this Court to review its prior decisions at this date when the principles involved therein have been academic for more than 4 years by reason of the aforesaid 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, *supra.*

In finding that the District Court had improperly styled Oldendorf's 50% contribution as an "indemnity",

the Court of Appeals was correct since indemnity is defined as a full recovery over, *Hurdich* v. *Eastmount Shipping Corp.,* 305 F. 2d 397, 403 (2 Cir. 1974). Since the District Court had thus denied indemnity, the Court of Appeals was entirely correct in following such finding because its review of the case indicated that Oldendorf was the party "best situated to adopt preventive measures and thereby reduce the likelihood of injury." That is, indeed, the very test prescribed by this Court in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964). And, see *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.,* 508 F. 2d 437 (2 Cir. 1974), cert. den. sub nom. *Cia de Nav. Mar. Netumar* v. *Conceicao,* 421 U.S. 949, 95 S. Ct. 1680 (1975). Here, too, it would seem to be pointless for this Court to review established principles of law more than 4 years after the kind of litigation that gave birth to those principles has been abolished by Act of Congress.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Respondents.

PETITIONER'S REPLY TO RESPONDENT INTERNATIONAL TERMINAL OPERATING CO., INC.'S BRIEF IN OPPOSITION

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IN THE

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This reply brief is being submitted because respondent, International Terminal Operating Co., Inc. is less than candid when it asserts in its brief that in the Court of Appeals it argued contribution as a defense to the award of indemnity to petitioner and that that issue was in fact raised, briefed and argued.

At page 3 of its brief, it is stated:

> "In its appeal to the Court of Appeals ITO argued, among other things, • • • that under controlling law neither Oldendorf nor Hoffman could recover contribution from ITO as the District Court had permitted. • • •"

It is to be noted that the first of the questions presented in the petition for a writ is inaccurate as the

legal issues on which the Court of Appeals decided the case were in fact raised, briefed and argued."

According to ITO's brief, contribution was presented as an issue only on the award to Hoffman (A 24-25).

In "The Course of Proceedings and Disposition In the Court Below", ITO states that the Court below held that ITO "was obligated to indemnify Oldendorf" (A 26) and that since Hoffman was negligent it "was also obligated to indemnify Oldendorf" (A 27).

According to ITO's brief, the subject matter of Point II was: "It Was Error To Grant Hoffman Contribution From ITO" (A 28). In the argument under Point II, it was urged: "It was error as a matter of law for the Court below to award Hoffman contribution from ITO" (A 29); "It was clearly legal error for the Court below to award Hoffman 50% contribution from ITO, and that part of the judgment should be reversed" (A 30); and Point II was concluded with the statement: "Accordingly, it was error for the Court below to award Hoffman a contribution of 50%" (A 30).

Nor do any of the alternatives set forth in ITO's conclusion even suggest that the award to petitioner against ITO should be set aside because it represented contribution and not indemnity (A 31-A 33).

CONCLUSION

The petition for a writ of certiorari should therefore be granted because the issue of contribution was not raised, briefed or argued as to the award to petitioner.

Respectfully submitted,

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ADDENDUM

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TABLE OF AUTHORITIES

The Issues on Appeal

By this appeal the third party defendant-appellant, INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter ITO) presents the following issues for review by this Court:

1. The plaintiff, an injured longshoreman who was in the employ of ITO, recovered judgment from EGAN OLDENDORF (hereinafter SHIPOWNER) solely on the basis of that SHIPOWNER's negligence. Notwithstanding that the SHIPOWNER's liability was based solely upon its own negligence, the Court below invoked an implied warranty of workmanlike service from ITO so as to require it to indemnify such negligent SHIPOWNER merely because the plaintiff had been found 15% contributorily negligent. We submit that under decided law an implied warranty of workmanlike service is not invoked to benefit a shipowner liable solely for its own negligence.

2. The plaintiff also obtained judgment against HOFFMAN RIGGING AND CRANE SERVICE, INC. (hereinafter HOFFMAN) for its negligence in operating a crane that was discharging cargo at the time of the accident. The Court awarded HOFFMAN 50% contribution from ITO notwithstanding that HOFFMAN had made no such claim against ITO in that action, and notwithstanding that the law quite clearly holds that an employer, such as ITO, paying compensation under the Longshoremen's and Harbor Workers' Compensation Act is not suable for contribution.

3. The only finding of fault on the part of ITO by the Court below was that it was vicariously responsible

for the plaintiff's 15% contributory negligence. The Court also found the accident was caused by the primary negligence of HOFFMAN in the operation of its crane. Nonetheless, the Court dismissed ITO's cross claim against HOFFMAN for indemnity and contribution, and we submit that such dismissal was error.

The Nature of the Case

This is an action brought by a longshoreman, BENITO LOPEZ, to recover damages for personal injuries sustained by him on October 21, 1968 while working in the #1 hatch of the M/V JOBST OLDENDORF, a vessel owned by the defendant and third party plaintiff, EGAN OLDENDORF. LOPEZ made claim against OLDENDORF for both unseaworthiness and negligence.

OLDENDORF in turn impleaded both ITO (the stevedore employer of LOPEZ) and HOFFMAN RIGGING & CRANE SERVICE, INC., the owner and operator of the shoreside crane that was actually hoisting and dragging the cargo of steel beams being discharged at the time of the accident; and it sought indemnity from both of them.

HOFFMAN and ITO each cross claimed against the other seeking both indemnity and contribution.

During the course of the trial LOPEZ was permitted to amend his complaint so as to sue HOFFMAN directly for its negligence in causing the accident.

The Course of Proceedings and Disposition In the Court Below

The action by LOPEZ against OLDENDORF was tried to a jury. By agreement between counsel (15a)* all claims and issues between OLDENDORF, ITO and HOFFMAN were tried solely to the Court. The action by LOPEZ against HOFFMAN was also tried to the Court. Counsel for all parties participated in the jury trial of the LOPEZ action against OLDENDORF.

In connection with LOPEZ' action against OLDENDORF, the jury returned a special verdict (218a-220a) holding as follows:

1. That LOPEZ failed to establish his claim of unseaworthiness against OLDENDORF.
2. That LOPEZ did establish his claim of negligence against OLDENDORF.
3. That LOPEZ' total damages amount to $365,000.
4. That LOPEZ was 15% contributorily negligent.

Deducting LOPEZ' 15% contributory negligence from his total damages left him with a recovery against OLDENDORF in the amount of $310,250 and judgment for such amount was entered (311a-313a).

Solely on account of the jury finding that LOPEZ had been 15% contributorily negligent in failing to take shelter as the draft was being discharged, the Court held that ITO had thereby breached a warranty of workmanlike service to OLDENDORF and was obligated to indemnify OLDENDORF (230a). By reason of the undisputed and,

* Unless otherwise indicated, all references are to the Joint Appendix.

indeed, admitted proof that HOFFMAN had caused the accident by topping the boom of its crane without receiving a signal to do so, the Court held that HOFFMAN was negligent and was also obligated to indemnify OLDENDORF. That same negligence on the part of HOFFMAN entitled LOPEZ to recover directly against HOFFMAN on his negligence action against HOFFMAN (300a), and the judgment entered awarded plaintiff a recovery of $310,250 against OLDENDORF and HOFFMAN, jointly and severally (312a).

The Court then dismissed ITO's cross claim against HOFFMAN for indemnity or contribution (309a).

The Court did, however, grant HOFFMAN 50% recovery from ITO in the event that HOFFMAN paid the judgment of $310,250 obtained against it by LOPEZ, *notwithstanding the fact that in such direct action by LOPEZ against HOFFMAN there had been no claim whatever asserted by HOFFMAN against ITO.*

Statement of Relevant Facts

The accident forming the basis of this lawsuit occurred at approximately 8:17 A.M. on October 21, 1968 in the #1 hold of the M/V JOBST OLDENDORF where the work taking place was the discharge of a cargo of steel beams (17a-18a). A shoreside crane owned and operated by HOFFMAN was being used to discharge the steel beams rather than the vessel's equipment (33a-34a). The vessel was tied up with her portside inshore and her starboard side offshore (26a).

The HOFFMAN crane had controls which permitted its operator to move the boom either up or down or from side to side (73a). It also had controls to permit the

sisted of continuing the stevedoring operation knowing that a boom was improperly positioned and without waiting for the boom to be repositioned. That case did not involve a stevedore who was only vicariously at fault because of the imputed contributory negligence of a plaintiff longshoreman who failed to take a place of safety. In view of the facts of that case, the equities lay with the shipowner and the Court found that case factually distinguishable from the *Schwartz* case, *supra*, which it did not overrule.

Consideration of the underlying rationale for the judicial invocation of an implied warranty of indemnity shows that in accordance with the almost unanimous judicial thinking and writing on the subject the SHIPOWNER in the instant case is entitled to no such equitable relief. It was thus error for the Court below to enter judgment requiring ITO to indemnify the SHIPOWNER for the SHIPOWNER's own negligence merely because this plaintiff was found to be 15% contributorily negligent in failing to take a place of safety.

POINT II

It Was Error to Grant Hoffman Contribution From ITO.

Since the SHIPOWNER in the jury action and HOFFMAN in the non-jury action were each held liable to the plaintiff for negligence, the judgment entered herein in favor of the plaintiff (312a) is directly against both the SHIPOWNER and HOFFMAN, jointly and severally. Said judgment then provides (312a-313a):

> "ORDERED and ADJUDGED that the defendant HOFFMAN RIGGING & CRANE SERVICE, INC.,

> if it pays the judgment herein, recover of the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., the sum of $155,125.00 together with interest thereon and one half the sum to be taxed as costs in favor of the plaintiff, BENITO LOPEZ, against said defendant, * * *".

It was error as a matter of law for the Court below to award HOFFMAN contribution from ITO.

It should be noted initially that in the plaintiff's direct non-jury action against HOFFMAN the pleadings consisted solely of an amended complaint (7a) and HOFFMAN's answer thereto (11a). *Examination of HOFFMAN's aforesaid answer shows that HOFFMAN made no claim against ITO for either contribution or anything else.* Nor did HOFFMAN in plaintiff's direct action against it, serve any other pleadings making claim against ITO for contribution or anything else. Thus, the Court below granted HOFFMAN a recovery for a claim not made.

Not only was no such claim for contribution advanced in any pleading by HOFFMAN, but no such claim exists in law. As earlier indicated, plaintiff was a longshoreman in the employ of ITO which furnished him with the benefits required by the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901 et seq. Accordingly, ITO is not subject to a claim for contribution, *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), 72 S. Ct. 277.

An employer's immunity to a claim for contribution by reason of the Longshoremen's and Harbor Workers' Compensation Act was again recognized and reaffirmed in *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company*, 406 U.S. 34 (1972), 92 S. Ct. 1550, affirming 442 F. 2d 694 (2 Cir. 1971).

When the same question was most recently considered in *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106 (1974), 94 S. Ct. 2174 the factors giving rise to the *Halcyon* decision were found to still have force, and the Supreme Court stated that the limitation-of-liability provisions of the *Longshoremen's and Harbor Workers' Compensation Act* protected the employer from a claim for contribution. As *Cooper Stevedoring, supra,* clearly indicates, although maritime law permits contribution between joint tortfeasors, an exception to that rule exists in favor of a compensation paying employer. It was clearly legal error for the Court below to award HOFFMAN 50% contribution from ITO, and that part of the judgment should be reversed.

Manifestly, if notwithstanding the foregoing, this Court should be of the view that HOFFMAN may obtain and is entitled to contribution from ITO herein, then such contribution must be in proportion to the relative degree of fault of both those parties, *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), 95 S. Ct. 1708. A 50% contribution is not proportionate.

The so-called "fault" on the part of ITO is purely vicarious and stems from the jury finding that plaintiff was 15% contributorily negligent. The fault of HOFFMAN, on the other hand, is for the improper topping of the crane boom without signal to do so, which caused the draft to drag over the other cargo in the hatch and a beam therefrom to topple onto plaintiff's leg. In any apportionment of damages in relationship to fault, it would seem evident that ITO's share should not exceed 15%, since that was the entire amount of the plaintiff's negligence that was imputed to it. Accordingly, it was error for the Court below to award HOFFMAN a contribution of 50%.

vicarious, it follows that ITO should recover contribution against the primary and affirmative wrongdoer, HOFFMAN, so that the entire recovery over by the SHIPOWNER against ITO and HOFFMAN is apportioned not more than 15% to ITO and not less than 85% to HOFFMAN. It was error for the Court below to dismiss ITO's claim for contribution against HOFFMAN.

CONCLUSION

(1) Plaintiff has obtained a judgment, jointly and severally against both the SHIPOWNER and HOFFMAN. If on SHIPOWNER's appeal that judgment is reversed as to it and the action against it is dismissed, then plaintiff has a judgment solely against HOFFMAN.

In plaintiff's direct action against HOFFMAN, it did not make claim against ITO for contribution, and it cannot legally make such a claim. Accordingly, the judgment granting HOFFMAN 50% contribution from ITO must be reversed. The end result of that situation would be that HOFFMAN is solely liable for payment of the plaintiff's recovery. As the plaintiff's recovery has already been reduced by plaintiff's 15% contributory negligence, HOFFMAN would really be responding solely for the amount of its own fault. Such a disposition of this matter would be completely fair and equitable and should commend itself to this Court which in applying the law of Admiralty is in effect acting as a court of equity.

(2) If this Court should deny the SHIPOWNER's appeal and let the judgment against it stand, consideration must then be given both to the SHIPOWNER's indemnity action against ITO and HOFFMAN, and to ITO's cross claims against HOFFMAN. If the judgment against the

SHIPOWNER based upon the verdict of its negligence is not reversed and dismissed, then SHIPOWNER is not entitled to recover indemnity from ITO. There is no equitable reason whatever for a Court to invoke an implied warranty of workmanlike service to benefit a shipowner liable for its own negligence. As this SHIPOWNER was liable solely for its own negligence, no implied warranty of indemnity from ITO is to be invoked. Without such an implied warranty, ITO is not cast into any liability by reason of plaintiff's contributory negligence.

In this situation, both the SHIPOWNER and HOFFMAN are left ultimately liable for the plaintiff's recovery which has already been reduced to the extent of plaintiff's contributing fault. Whether such liability should be divided equally between them, or whether it should be apportioned on contribution principles so that HOFFMAN pays more than the SHIPOWNER, is a matter on which we express no opinion. However, for two negligent parties such as SHIPOWNER and HOFFMAN to be required to pay in proportion to their respective fault the plaintiff's reduced recovery would also be an equitable result which should commend itself to this Court if it denies SHIPOWNER's appeal.

(3) If both the SHIPOWNER and HOFFMAN are liable to the plaintiff, and if the SHIPOWNER is then granted indemnity against both ITO and HOFFMAN, the judgment dismissing ITO's cross claims for indemnity or contribution from HOFFMAN is in error and should be reversed. Only vicariously liable for the imputed 15% contributory negligence of the plaintiff, ITO is entitled to full indemnity from the primary and affirmative tortfeasor, HOFFMAN. The end result of such situation would be that HOFFMAN is required to ultimately pay the plaintiff's reduced recovery, which is again a fair and equitable result herein.

If ITO is not granted indemnity from HOFFMAN, then the recovery over by the SHIPOWNER against both ITO and HOFFMAN should be apportioned so that ITO is required to pay no more than the 15% contributory negligence imputed to it, and HOFFMAN is required to pay at least 85%. This would result in making ITO an ultimate payor of up to 15% of plaintiff's recovery and making HOFFMAN an ultimate payor of at least 85% of plaintiff's recovery. This is neither as fair nor as equitable a result as the others posited above, but is certainly preferable to the present situation whereby ITO is required to pay a full 50% of the recovery.

Respectfully submitted,

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